Andrews v. *Mitchell.*[2] That was a case in which a member of a friendly society was duly summoned before the arbitration committee for a breach of the rules, and was in his absence expelled from the society by a resolution of the committee upon a different charge, namely, of fraud and disgraceful conduct, of which no written notice had been given to him as required by the rules. It was held that the decision was null and void. Quite clearly that case can also have no application to the present case. The case of *Heard* v. *Pickthorne* [3] also has no application here because the resolution complained of by the plaintiff in that case was illegal and *ultra vires*. Again, *Winter* v. *Wilkinson* [4] does not help the plaintiff because there the defendants who were the trustees, secretary and treasurer of a lodge registered as a branch of the O. Friendly Society, had wrongfully divided the funds of the lodge between the members thereof in breach of the rules. In *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society* [5] it was held that a dispute whether certain rules of the society were *ultra vires* was not a dispute between a society and its members within section 49 of the Industrial and Provident Societies Act, 1893, and that the action was therefore competent.

As was argued by counsel for the defendants, I think quite rightly, that the cases cited on behalf of the plaintiff refer to the supervisory jurisdiction of the High Court and not to its original jurisdiction. It requires no show of authority to say that where a statute confers powers on a particular body to decide certain matters and that body in making any decision goes outside its powers, then the High Court can set aside any decision of that body. In other words, there must be an error going to the jurisdiction of the body. The High Court in such a case does not itself make a decision but merely sets aside the decision of that body in the exercise of its supervisory jurisdiction.

The crux of the matter in this case is whether there has been a dispute between a member of the union and the the union. The word "dispute" is not defined in the Ordinance, although section 46 provides that the expression "dispute" shall include certain disputes. The word "dispute" therefore must be given its ordinary meaning. It is clear from the pleadings that the parties in the present case are in dispute.

As I have stated, the rules of the union made in strict accordance with the provisions of the Trade Unions Ordinance, 1959 provide that any dispute between a member and the union shall be decided by reference to arbitration with a right of appeal to the annual general meeting whose decision shall be binding and conclusive. The rules also provide that the parties may by consent refer to the Registrar of Trade Unions a dispute connected with any non-compliance with any rule of the union. Section 44(6) of the Ordinance provides that where the matter is one which, by the rules, should be referred to arbitration, and one party has not, within forty days, complied with the request to join in appointing arbitrators, or the arbitrators has not made an award, the sessions court may hear and decide the dispute. That seems to me equivalent to an enactment that no other court shall, in such a case, do so (see *The Municipal Permanent Investment Building Society* v. *Kent* [6] and *Norwich Corporation* v. *Norwich Electric Tramways Co., Ltd.*[7]). The only way in which any such dispute can come before the High Court is by way of a case stated for its opinion on any question of law as provided under section 45 of the Ordinance. In the result I must hold that this court has no jurisdiction to hear and adjudicate upon this action. The action will therefore be dismissed with costs.

Action dismissed.

Solicitors: *Xavier & Thambiah; V. K. Palasuntharam.*

LOPEZ v. VALLIAPPA CHETTIAR

[P.C. (Viscount Dilhorne, Lord Hodson, Lord Upjohn, Lord Pearson & Sir Frederic Sellers) January 24, 1968]

Practice and Procedure — Appeal — Federal Court — Circumstances when appeal from it to the Privy Council is as of right — Exercise of discretion only in certain cases — Courts of Judicature Act, 1964, s. 74.

Privy Council — Appeal — Discretion in granting of special leave.

The petitioner had instituted proceedings in the High Court for the specific performance of an oral agreement for the sale of land. The only issue before the trial judge was a pure question of fact. The action was dismissed by the High Court and on appeal, the High Court's findings were affirmed by the Federal Court. The petitioner then applied to the Federal Court for conditional leave to appeal to the Privy Council. The petitioner's application was unanimously dismissed and on December 9, 1967 Ong Hock Thye F.J. gave his reasons for doing so. He clearly thought that the Federal Court had discretion to refuse leave to appeal and that the appeal did not lie as of right. He said that it would not be right to put the respondent to further heavy expense and inconvenience by giving leave as the appeal appeared to receive short shrift in the Privy Council. On an application to the Privy Council for special leave to appeal:—

Held, refusing the application: (1) where an application is made to the Federal Court for leave to appeal to the Privy Council and the matter comes within section 74(1)(a)(i) or (ii) of the Courts of Judicature Act, 1964, an appeal lies as of right and the Federal Court does not have discretion to refuse leave to appeal. The Federal Court only has discretion to refuse leave in cases which come within section 74(1)(a)(iii) and 74(1)(b);

(2) the granting of special leave to appeal by the Judicial Committee is a matter of discretion and not of right. The application for special leave was refused on

the ground that the case was not a fit one for appeal to the Privy Council.

Obiter Dictum: "whether or not it is desirable that the Federal Court should be given a discretion to refuse leave to appeal in cases which come within section 74(1)(a)(i) and (ii) in order to protect respondents from having to incur heavy expense and suffer inconvenience when in the words of Ong Hock Thye F.J. 'the appeal appears likely to receive short shrift in the Privy Council' is not a matter for their Lordships but for the Legislature."

Cases referred to:—

(1) *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* [1946] A.C. 508.

(2) *Chua Chee Chor* v. *Chua Kim Yong & Ors.* [1963] M.L.J. 17, P.C.

(3) *Ratnam* v. *Cumarasamy* [1962] M.L.J. 330, C.A.

(4) *Chikwakwata* v. *Bosman* [1965] S.A.L.R. 57.

(5) *Davis* v. *Shaughnessy* [1932] A.C. 106, P.C.

The appellant in Federal Court Civil Appeal No. X. 68 of 1966 applied for conditional leave to appeal to His Majesty the Yang di-Pertuan Agong. His application was unanimously dismissed by the Federal Court on June 28, 1967.

Ng Ek Teong (*R. Padmanabhan* with him) for the appellant.

M. Shankar for the respondent.

On December 9, 1967 Ong Hock Thye F.J. gave his grounds of decision as follows:—

Ong Hock Thye F.J.: On June 28, 1967 the appellant's application for conditional leave to appeal to His Majesty the Yang di-Pertuan Agong was unanimously dismissed by this court. I now state the grounds of my decision.

The only issue before the learned trial judge was a pure question of fact: was the true price of the Rex theatre $70,000 or $125,000? If the latter, the claim was necessarily a false one.

Gill J. decided in favour of the defendant. One of the facts which, in his judgment, told heavily against the plaintiff was as follows:—

"The plaintiff's contention was that by 28th October 1957 he had paid the defendant more than the sale price of the Rex theatre and that thereafter and up to 23rd April 1958 he had paid the defendant further sums totalling $32,200. If the plaintiff's story as to the agreed purchase price of the Rex theatre was true there was no reason for him to pay $12,000 on 20th May 1958 towards the agreed price of $22,000 for the car park when before that date he had already advanced to the defendant much more than the amount of such agreed price. The defendant had supplied the plaintiff with a chit (D.12) showing the total amounts which had been paid to him up to that time. This account was never queried by the plaintiff."

For my own part, I had no doubt whatsoever that the learned trial judge had come to the right conclusion for reasons which are set out fully in pages 5 to 11 of my judgment. I said *inter alia* at page 9:—

"At any rate, the state of accounts in May 1958 was sufficient by itself to discredit the appellant's story. As the learned trial judge said, with $32,200 standing to his credit, there was no reason for the appellant to make any further payment on account of the purchase price of the parking lot. He was a businessman, not an imbecile. What is even more surprising is that he should have paid anything at all into court."

In deciding whether or not to grant conditional leave, we cannot, of course, ignore the judgment of the Privy Council delivered by Lord Thankerton in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* (1) concerning the present practice of the Board and the nature of the special circumstances which will justify a departure from such practice.

In *Chua Chee Chor* v. *Chua Kim Yong & Ors.*(2) the Privy Council, dismissing the appeal, reaffirmed that the Board would decline to review the evidence for a third time where there were concurrent judgments of two courts on a pure question of fact, which is again the case here. In my opinion there were also no special circumstances here of a nature sufficient to justify departure from the practice. It would not be right, therefore, to put the respondent to further heavy expense and inconvenience by giving leave if the appeal appears likely to receive short shrift in the Privy Council.

The appellant sought special leave from the Privy Council to appeal from the decision of the Federal Court.

PRIVY COUNCIL.

Sir Dingle Foot Q.C. and *L. Blom-Cooper* for the petitioner.

E. F. N. Gratiaen Q.C. and *John Baker* for the respondent.

Viscount Dilhorne (delivering the opinion of their Lordships): The petitioner sought special leave to appeal from the decision of the Federal Court of Malaysia dismissing his appeal from a judgment in the High Court in Kuala Lumpur dismissing his claim for specific performance of an oral agreement for the sale of land.

The petitioner's application to the Federal Court for conditional leave to appeal was unanimously dismissed by that court. On 9th December 1967 Ong Hock Thye F.J. gave his reasons for doing so. He clearly thought that the Federal Court had discretion to refuse leave to appeal and that the appeal did not lie as of right. He said that it would not be right to put the respondent to further heavy expense and inconvenience by giving leave as the appeal appeared likely to receive short shrift in the Privy Council.

Sir Dingle Foot, who appeared for the petitioner, argued that the Federal Court was wrong in holding that it had a discretion in the matter, that the appeal lay as of right and that the Federal Court by their decision had deprived the appellant of a right he had under statute. He urged that the Judicial Committee by giving special leave should restore to the appellant the right of which he had been deprived.

The Courts of Judicature Act 1964 was the Act under which application was made to the Federal Court but before referring to the terms of that Act it will be convenient to refer to and to consider the terms of two Ordinances which preceded it.

The Appeals to His Majesty in Council Ordinance 1949 (F.M. No. 50 of 1949) provided *inter alia* as follows:—

"Section 3(1). Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the courts of the Federation, an appeal shall lie from the court to His Majesty in Council —

(a) from any final judgment or order, provided that —

(i) the matter in dispute on appeal to His Majesty in Council amounts to or is of the value of four thousand five hundred dollars or upwards; or

(ii) the appeal to His Majesty in Council involves, directly or indirectly, some claim or question to or respecting property or some civil right of like amount or value; or

(iii) the case is from its nature a fit one for appeal, and

(b) from any interlocutory judgment or order which the court considers a fit one for appeal to His Majesty in Council."

From this provision it is clear that under this Ordinance an appeal lay as of right from any final judgment or order in cases coming within (i) and (ii) above and that the court had discretion to grant or refuse leave in cases coming within (iii) and (b).

Section 3(2) of the Ordinance provided that:—

"Application for leave to appeal to His Majesty in Council shall be made to the court within six weeks from the date on which the decision appealed against was given, or within such further time as may be allowed by the court:

. . . ."

and section 3(3) was as follows:—

"Where the judgment appealed from requires the appellant to pay money or perform a duty, the court shall have power, when granting leave to appeal, either to direct that such judgment shall be carried into execution thereof shall be suspended pending the appeal, as to the court shall seem just; and in case the court shall direct such judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the court, for the due performance of such Order as His Majesty in Council shall see fit to make thereon."

The application for leave to appeal, it thus appears, is for the purpose of enabling the court to exercise its powers under section 3(3). An application to the court for leave is also necessary to enable the court to fix security for the appeal.

This Ordinance was repealed and replaced by the Appeals from the Supreme Court Ordinance 1958 (No. 16 of 1958). Section 3(1) of this Ordinance provided that an appeal should lie from the Supreme Court to the Yang di-Pertuan Agong "with the leave of the court granted in accordance with the provisions of section 4" *inter alia* in the cases covered by (a) and (b) of the 1949 Ordinance. Section 4 was similar in all material respects to section 3(2) and (3) of the 1949 Ordinance.

The omission to refer to leave to appeal in section 3(1) of the 1949 Ordinance when section 3(2) began with referring to an application for leave to appeal may have appeared to the draftsman as somewhat untidy and have led to the insertion of the words "with the leave of the court granted in accordance with the provisions of section 4" in section 3(1) of the 1958 Ordinance. Whatever the reason for this change may have been, it would not have been sufficient to justify the conclusion that it converted an appeal as of right into an appeal only with the leave of the court granted in the exercise of its discretion.

In *Ratnam* v. *Cumarasamy*,[3] a decision on the 1958 Ordinance, it was held by the Court of Appeal that an order made by that court which barred the appellant from appealing to that court was a final order and consequently an appeal lay as of right to the Judicial Committee in a case coming within section 3(1)(a)(i) of that Ordinance. It was not suggested in that case that the reference to leave to appeal in section 3(1) meant that the court had a discretion to refuse leave to appeal against a final order coming within section 3(1)(a)(i).

The 1958 Ordinance was replaced by the Courts of Judicature Act 1964. Sections 74 and 75 of this Act were similar in all respects material to this case to the Ordinance of 1958. Section 74(1) provided that an appeal should lie from the Federal Court to the Yang di-Pertuan Agong with the leave of the court granted in accordance with the provisions of section 75:—

"(a) from any final judgment or order in any civil matter where —

(i) the matter in dispute in the appeal amounts to or is of the value of five thousand dollars upwards; or

(ii) the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right of like amount or value; or

(iii) the case is from its nature a fit one for appeal; and

(b) from any interlocutory judgment or order which the Federal Court considers a fit one for appeal."

Section 75 corresponded in all material respects to section 4 of the 1958 Ordinance and section 3(2) and (3) of the 1949 Ordinance.

The judgment of the Federal Court dismissing the appellant's appeal was a final judgment where the matter in dispute was of a value in excess of $5,000 and the appeal involved property worth more than that amount. The petitioner's claim therefore came within section 74(1)(a)(i) and (ii).

It does not appear from the grounds stated by Ong Hock Thye F.J. for refusing leave to appeal that the attention of the Federal Court was drawn to *Ratnam* v. *Cumarasamy*.[3] That decision was on the basis that an appeal lay as of right from a final order coming within (a) (i). If so, the same must apply in relation to a final judgment or order coming within (a) (ii).

As the question raised on this application for leave may arise on other applications before the Federal Court, their Lordships think that it is desirable that they should express their views upon it. In their opinion *Ratnam* v. *Cumarasamy* [3] was decided on the right basis and an appeal lies as of right in cases which come within (a) (i) and (ii), provided of course that the appellant complies with any order that the court may make under section 75 or in relation to security. It appears to the board that the Federal Court only has discretion to refuse leave to appeal in cases which come within (a) (iii) and (b).

Although as Beadle C.J. pointed out in *Chikwakwata* v. *Bosman* [4] at p. 60 the word "leave" normally implies a discretion to give or withhold permission, the reference to leave in section 74 is a reference to section 75 and does not in the context imply such a discretion.

The granting of special leave to appeal by the Judicial Committee is a matter of discretion and not of right (*Davis* v. *Shaughnessy*,[5]) *per* Viscount Dunedin at p. 112. Their Lordships agree with the Federal Court in their conclusion that this case is not a fit one for appeal to the Judicial Committee and they do not consider that they should exercise their discretion by granting leave solely on account of the fact that the appeal was wrongly treated by the Federal Court as one in which that court had a discretion.

Whether or not it is desirable that the Federal Court should be given a discretion to refuse leave to appeal in cases which come within section 74 (1) (a) (i) and (ii) in order to protect respondents from having to incur heavy expense and suffer inconvenience when in the words of Ong Hock Thye F.J. "the appeal appears likely to receive short shrift in the Privy Council" is not a matter for their Lordships but for the Legislature.

For the reasons stated their Lordships have reported to the Head of Malaysia their opinion that the application for special leave be refused.

Application refused.

Solicitors: *Graham Page & Co.; T. L. Wilson & Co.*

MOHAMED v. COMMISSIONER OF LANDS & MINES, TRENGGANU & ANOR.

[F.C. (Azmi C.J. (Malaya), Ismail Khan and MacIntyre JJ.) February 5, 1968]

[Kuala Trengganu — Federal Court — Civil Appeal No. X. 51 of 1966]

Administrative Law — Certiorari — Error of law on face of record — Excess of jurisdiction — Decision of tribunal "shall be final" — Whether subject to certiorari — Harta sapencharian — Trengganu Land Enactment, 1357, s. 60.

Malay Customary Law — Harta sapencharian laki bini — Claim for.

This was an appeal against the order of the High Court at Trengganu dated June 12, 1966, ([1967] 1 M.L.J. 76), quashing the order of the Commissioner of of Lands and Mines dated December 22, 1964. By this order the commissioner had set aside an order of the Collector of Land Revenue, Kuala Trengganu, awarding the second respondent a half share in the land comprised in A.A. 457/55. The appellant after his marriage to the second respondent applied for and was granted the said piece of land in area about nine acres. It was jungle land. It was then cleared and planted with rubber. The appellant admitted the help in harvesting padi and transplanting rubber seedlings he received from his wife, but denied that she had any part in cultivating it. On January 11, 1959, about ten years after the marriage the second respondent was divorced. She then claimed under section 60 of the Trengganu Land Enactment for a half share in the land as *harta sapencharian*.

Held, dismissing the appeal: (1) there was no merit in the appellant's contention that there was a denial of the rules of natural justice;

(2) there was no miscarriage of justice, and, where there was no miscarriage of justice, there could be no excess of jurisdiction;

(3) the commissioner having found that the land was acquired during coverture and that the second respondent had contributed to its development the presumption arose that it was *harta sapencharian* which had not been rebutted. In denying the second respondent her share in the land the commissioner had acted on a principle unknown to the law.

Cases referred to:—

(1) *R.* v. *Northumberland Compensation Appeal Tribunal* [1952] 1 All E.R. 122.

(2) *Re Gilmore's Application* [1957] 1 All E.R. 796.

(3) *Chop Tong Yuen & Ors.* v. *The Asia Insurance Co. Ltd. & Anor.* (1956), 3 M.C. 62.

(4) *Roberts* v. *Ummi Kalthom* [1966] 1 M.L.J. 163.

(5) *Hajjah Sulong binte Abu Bakar* v. *Mamat bin Mat Amin*, Kuala Trengganu Civil Appeal No. 7 of 1951, unreported.

(6) *Hujah Lijah* v. *Fatimah* [1950] M.L.J. 63.

FEDERAL COURT.

Dato' Abdullah bin Abdul Rahman (*Vijayanathan* with him) for the appellant.

Mohamed bin Yaacob (State Legal Adviser) for the 1st respondent.

A. Wilson for the 2nd respondent.

Cur. Adv. Vult.

Ismail Khan J.: This is an appeal against the order of the High Court at Trengganu dated